Supreme Court, U.S.
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No. 86-1606

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

IN RE:
TONY SLOAN,
LOLA BETTYE SLOAN,
NED T. SLOAN,
JIMMIE SLOAN,
MARGARET SLOAN,
BRUCE SLOAN, and
JOHN A. SLOAN - - - - - Petitioners

versus

JOE LEE, Bankruptcy Judge, U. S. District Court for the Eastern District of Kentucky - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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HOPP

QUESTION PRESENTED FOR REVIEW

I. When a case has been decided by the Sixth Circuit Court of Appeals and remanded to the Bankruptcy Court for further action, did the Court of Appeals subsequently abuse its discretion in refusing to grant a mandamus to compel the Bankruptcy Court to adopt the Petitioners' interpretation of the Court of Appeals' decision, or, in the alternative, to require the Bankruptcy Judge to recuse himself on the grounds that he did not agree with Petitioners' interpretation.

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v.

JOE LEE, Bankruptcy Judge, U. S. District Court for the Eastern District of Kentucky - - - - - *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

A. Nature of Case

This matter comes before the Court on Petition for Writ of Certiorari from the decision of the Sixth Circuit Court of Appeals denying the Petitioners' Petition for Writ of Mandamus. The Petitioners sought to

compel the Bankruptcy Judge, the Honorable Joe Lee of the United States Bankruptcy Court for the Eastern District of Kentucky, to adopt the Petitioners' interpretation of the mandate of the Sixth Circuit as set out in *In Re: Becknell & Crace Coal Company, Inc.*, 761 F. 2d 319 (6th Cir. 1985). In addition, the Petitioners sought to compel the Honorable Joe Lee to recuse himself on the grounds that he did not agree with Petitioners' interpretation of that decision, and did not rule in favor of the Petitioners in the litigation on remand to the Bankruptcy Court.

There was no Writ of Mandamus sought against the Trustee, Ruben G. Hicks, and so the Trustee is not named as a Respondent. The Trustee was named by the Petitioners as a party to this action, and has been involved in all stages of this litigation.

B. The Course of the Proceeding

In May of 1972, the Bankrupt filed a proceeding under Chapter XI of the Bankruptcy Act. On August 21, 1972, the Petitioners filed in the Bankruptcy proceeding a Petition to Direct Rejection of the Lease-Purchase Agreement as an Executory Contract. Subsequently, Ruben G. Hicks, was appointed as Trustee for the Bankrupt and an answer was filed to the Sloan's position asserting a fee simple ownership to the coal in question. As a precaution, and in case the Court disagreed with the Trustee's interpretation of the document as giving the Bankrupt, and hence the Trustee, a fee simple interest in the property in question, the Trustee also timely filed an Application for an Exten-

sion of Time to Reject or Assume the document as an Executory Contract in case it should be so construed. (Respondent's Appendix pp. 1a-2a) The Application was made within thirty (30) days of the appointment of the Trustee. The Bankruptcy Court subsequently held that the contract was not executory, and therefore, the Application for Extension was moot. The District Court, on appeal, also held that the Agreement was not executory, for different reasons. The Sixth Circuit reversed the lower court in part, holding that the agreement was executory as it pertained to the use of the surface, affirmed in part, holding that the document conveyed a fee simple estate in the coal, and remanded the action to the Bankruptcy Court.

The Court of Appeals noted that "because the Lease Purchase Agreement was executory, the Trustee should have been given the opportunity to assume or reject the contract. *See:* 11 USC Section 110." The Court observed that the Trustee had filed a Petition for Extension of Time to Assume or Reject, but the Bankruptcy Court, having determined that the agreement was not executory, denied the petition as moot. "The Trustee, therefore, did not have an opportunity to assume or reject the Lease-Purchase Agreement." *In Re: Becknell & Crace,* 761 F. 2d at 322. A Petition for Rehearing, en banc, was denied by the Sixth Circuit Court of Appeals.

The Petitioners then filed a Petition for Writ of Certiorari to the decision of the Sixth Circuit Court of Appeals. The Petition was denied by this Court, December 2, 1985, No. 85-600, as was the subsequent

Petition for Rehearing. In this original Petition for Writ of Certiorari, the Petitioners complained that the decision by the Sixth Circuit granted a fee simple interest to the Trustee and allowed additional time for the Trustee to assume or reject the executory contract. (Respondent's Appendix, pp. 3a-4a)

During the pendency of the appeal process, the Trustee filed an adversary action against the Petitioners requesting the right to enter into an Option to Lease Agreement for the coal in place. The adversary action was stayed during the appeal. After the Mandate of the Sixth Circuit became final, and after the stay of adversary action was lifted, a trial was held upon the adversary action below. At the trial on March 19, 1986, the Petitioners petitioned the Court to allow the Trustee to enter into a Lease-Purchase Agreement to lease the coal in place, to which the Trustee had been given a fee simple interest by the mandate of the Sixth Circuit. The Trustee was not in a position at that time to know whether it would be in the best interest of the Bankruptcy estate to assume or reject the executory portion of the Lease-Purchase Agreement before the lessee had acted upon its option to lease. The Trustee therefore renewed his request for an extension of time in which to either assume or reject the executory aspects of the Lease-Purchase Agreement in accordance with the Sixth Circuit's opinion.

The Petitioners objected to the Trustee's petition and motion, arguing that the *In Re: Becknell & Crace,* decision gave the debtor in bankruptcy, but not the Trustee, the fee simple ownership in coal; that the

Sixth Circuit Court of Appeals reaffirmed the Petitioners' right to terminate the agreement; that since the Trustee had never been given the opportunity to assume or reject the lease, the opportunity was lost forever. The Petitioners introduced testimony that prior to the filing of bankruptcy, one of the Petitioners gave oral notice of termination to an employee of the bankrupt.

At the close of the hearing, the Honorable Joe Lee granted the Trustee's petition and motion, holding that the Option to Lease Agreement was in the best interests of the estate, and that the Trustee should be granted an extension of time to assume or reject the executory portion of the agreement. The Court also held that the Petitioners did not make a timely or effective termination of the agreement prior to the bankruptcy proceedings, even though the issue of termination was barred by res judicata (Petitioner's Appendix, pp. 23a-26a). Subsequent to Judge Lee's oral decision from the bench, but prior to the entry of the written Findings of Fact, Conclusions of Law and Order, the Petitioners filed a Motion to Recuse pursuant to 28 USC Section 144. (Respondent's Appendix, pp. 5a-16a) The affidavits accompanying the motions allege no extra-judicial misconduct or impropriety on the part of the Honorable Joe Lee, but state only that since the Petitioners did not prevail, the Bankruptcy Court Judge must be biased and prejudiced against them. The motion was found to be neither timely nor legally sufficient by order of the Court entered July 3, 1986. (Respondent's Appendix, pp. 17a-18a)

Subsequent to the hearing, the Petitioners filed an action against the Shamrock Coal Company, Incorporated, the holders of the Option to Lease, and others in the Clinton Circuit Court of the Commonwealth of Kentucky, seeking to enjoin Shamrock from entering on to the premises to explore or prospect for coal. The action taken by the Petitioners was directly contrary to the Judgment of the Bankruptcy Court, which allowed the Trustee, his agents, and the agents of the lessee under the Option to Lease Agreement to enter on to the premises and conduct exploration and prospecting. The Trustee filed a Motion for Temporary Restraining Order and was granted a preliminary injunction on June 18, 1986, after a hearing. (Petitioner's Appendix, pp. 27a-30a)

The Petitioners filed a Notice of Appeal on June 20, 1986. (Respondent's Appendix, pp. 19a-20a) No Motion for a stay pending the appeal was filed in the Bankruptcy Court as is required by Bankruptcy Rule 8005, and no tender of a supersedeas bond has ever been made.

Petitioners filed a Petition for Writ of Mandamus in July, 1986, to the Sixth Circuit Court of Appeals. (Petitioner's Appendix, pp. 34a-60a) The Petition alleged that the exact and literal language of the *In Re: Becknell & Crace,* decision did not give the Trustee a fee simple interest in the coal in place, declared the entire Lease Purchase Agreement to be executory, declared that the Petitioners retain the right to terminate the agreement even after bankruptcy protection had been obtained and provided that the Trustee had

lost his opportunity to assume the executory agreement. The Writ also sought to compel the Bankruptcy Court Judge to dismiss the adversary action for lack of jurisdiction, under the theory that the Trustee had no interest. It also sought to compel the Bankruptcy Court Judge to recuse himself and to set aside and void orders entered after the recusal affidavits were filed and to take no further action in the proceedings. The Petition was denied by the Sixth Circuit on October 10, 1986, (Petitioner's Appendix, pp. 1a-2a), and a rehearing en banc was denied on January 6, 1987. (Petitioner's Appendix, pp. 22a)

REASONS FOR DENYING WRIT OF CERTIORARI

I. The Decision to Deny Petitioner's Writ of Mandamus was Well Within the Discretion of the Court of Appeals.

Supreme Court Rule 17 provides that a Writ of Certiorari is not a matter of right, but of judicial discretion and will only be granted when there are special or controlling reasons therefor. The Rule cites an example, neither controlling nor fully measuring, instances where a Federal Court of Appeals has so departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Here, there was no such departure.

The Court of Appeals correctly noted that a Writ of Mandamus is an extraordinary remedy, which should be granted only when no other adequate means exists to obtain the requested relief. *Kerr* v. *United*

States District Court for the Northern District of California, 426 U. S. 394, 402, 403 (1976). The party seeking the relief has the burden of showing that its entitlement to the Writ is clear and indisputable. *Will* v. *United States,* 389 U. S. 90 (1967). The Writ is never a substitute for appeal. *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964).

In *Banker's Life & Casualty Company* v. *Honorable John W. Holland,* 346 U. S. 379 (1953), this Court affirmed the actions of the Court of Appeals for the Fifth Circuit in denying a Writ of Mandamus against a district court judge. The Court held that it was not the function of the All Writs Act to control and supervise every decision of a trial court, even where a particular decision may be erroneous. *Banker's Life,* 346 U. S. at 382, 383.

Although the Petitioners argue that the Bankruptcy Court Judge has usurped jurisdiction and ignored the Mandate of the Sixth Circuit, their only grounds for saying this is that they disagree with his decisions. In this respect, their situation is not extraordinary, so as to warrant a Writ of Mandamus, but is very ordinary. If the Sixth Circuit Court of Appeals had granted the Writ of Mandamus based upon the Petitioners' complaint that the Bankruptcy Judge did not accept their interpretation of the law, then every litigant who loses in the trial court would be entitled to a Writ of Mandamus.

II. The Bankruptcy Court Judge Ruled in Accordance With the Mandate of the Sixth Circuit Court of Appeals, and Did Not Usurp Its Jurisdiction.

The Petitioners argue that the *In Re: Becknell & Crace, supra* decision of the Sixth Circuit Court of Appeals, clearly and unquestionably gives no title to the Trustee, declares the entire agreement to be executory, reaffirms the right of the Petitioners to terminate the agreement even after the Bankruptcy and declares that the Trustee has lost his time to assume the executory agreement. A reading of the decision quickly shows that the Petitioners' interpretation is tortured at best. It is also odd that when the decision was first rendered by the Sixth Circuit, the Petitioners asked for a Writ of Certiorari. In that Writ, the Petitioners argued that the Court of Appeals abused its discretion in granting a fee simple interest in the coal in place to the Trustee, and allowing the Trustee additional time in which to assume or reject the contract. Once the original Writ of Certiorari was denied, and the mandate of the Sixth Circuit Court of Appeals became final, the Petitioners could no longer argue that the agreement did not convey a fee simple interest in the coal, or that the Trustee shouldn't be given more time in which to assume or reject the contract. Having lost the war, Petitioners simply declared a victory, and argued before the Bankruptcy Court on remand that the Sixth Circuit had ruled in its favor all along. When the Bankruptcy Court refused to adopt this twisted interpretation of the Sixth Circuit's decision, not only

did the Petitioners appeal that decision, but they also sought the Writ of Mandamus from the Sixth Circuit.

In its decision, the Sixth Circuit states, "We believe that the terms of the Lease-Purchase Agreement granted Becknell a fee simple interest in the coal." *In Re: Becknell & Crace,* 761 F. 2d at 321. The Bankrupt, Becknell & Crace Coal Company, Inc., was ruled to have taken a fee simple interest in the coal, and the Trustee in turn was vested through 11 USC Section 110 of the old Bankruptcy Act, with title to that property and all other property of the Bankrupt.

The Court also wrote that, "We note that our decision does not alter the provisions of the contract." *In Re: Becknell & Crace,* 761 F. 2d at 322. Since the Court only gave the agreement its legal effect, and did not attempt to rewrite it, the statement is undoubtedly correct. The Petitioners used this statement to argue that the Court intended to resurrect or reaffirm the Petitioners' right to terminate the agreement, despite the intervention of the Bankruptcy proceedings. Although the Petitioners stated that ample evidence of "oral and written termination" were throughout the course of the litigation presented to the Bankruptcy Judge, the record shows that only after the action had been remanded to the Bankruptcy Court did one of the Petitioners testify he gave oral notice to an employee of the Bankrupt . The Bankruptcy Court in its opinion of June 11, 1986, correctly noted that the issue of termination prior to the filing of the bankruptcy was res judicata, since it was necessarily an issue of the litigation previously before the Bankruptcy Court, which

was appealed to the District Court and finally to the Sixth Circuit Court of Appeals. The Judge also found there was no proof of written notice of default as required by the agreement, that there was no showing that the employee to whom the oral notice was given was an officer of the debtor corporation, and no evidence that the lone Petitioner had power to terminate the agreement on behalf of all of the other Petitioners.

Once the bankruptcy proceeding was filed, the Petitioners' right of termination was subject to the Trustee's right to assume the agreement. 11 USC Section 110(b) of the old Bankruptcy Act provides that the Trustee shall assume or reject an executory contract within thirty (30) days after his qualification, but provides that the Court may, for cause shown, extend or reduce that time. The Trustee made just such a timely and sufficient application. Since both the Bankruptcy Court and District Court held that the agreement had no executory character, the Trustee had never had an opportunity, as the Court of Appeals noted, to assume or reject, until the matter was remanded.

The Petitioners argue that under the former Bankruptcy Rule 607, the Bankruptcy Court could not enter an order extending the Trustee's time to assume or reject later than sixty (60) days following the Trustee's appointment. However, Section 110(b) contains no such limitation. Former Rule 607 took effect on October 1, 1973, except to the extent that in the opinion of the Court, the Application of the Rule in a particular proceeding would not be feasible or would work an

injustice. Accordingly, the Bankruptcy Court was not bound by the sixty (60) day limitation as the limiting period had already well passed when the Order was promulgated, and to enforce it retroactively would have worked a hardship.

III. A Judge Is Not Bound by a Motion to Recuse, Which Is Neither Timely Nor Sufficient.

The Petitioners argue that 28 USC 144 and 28 USC 455(a) required the Bankruptcy Court Judge to recuse himself, where, after the conclusion of the hearing on remand, and after the decision was rendered orally from the bench, but before the written decision was entered, Petitioners filed a Motion to Recuse. Although Petitioners are correct that those statutes state that a Judge "shall" recuse, this is only required when timely and sufficient affidavits are presented, alleging that the Judge has a personal bias or prejudice, or when the Judge's impartiality might reasonably be questioned.

The ground for the Motion to Recuse was that in the Petitioners' opinion the Bankruptcy Judge was in error, and since the Petitioners believe that their opinion is the only conclusion a reasonable man could reach, Judge Lee must be deliberately refusing to rule that the law lies in the favor of the Petitioners.

The Petitioners have utterly failed to allege personal bias or prejudice on behalf of the Judge, as is statutorily required. *Parrish* v. *Board of Commissioners of Alabama State Bar,* 524 F. 2d 98 (5th Cir. 1975), *Davis* v. *Board of Commissioners of Mobile County,* 517 F. 2d 1044 (5th Cir. 1975). "It is well

settled that the requisite basis for bias and prejudice under Section 144 must be extra-judicial." *Davis,* 517 F. 2d at 105. If the Petitioners' allegations were legally sufficient to support their motion for recusal, then every losing litigant in every court of the United States would have a similar right. The Petitioners' motion, coming at the end of 14 years of litigation, and after a hearing at which the Court has ruled against them, alleging nothing more than disagreement with the Judge, is neither timely nor sufficient.

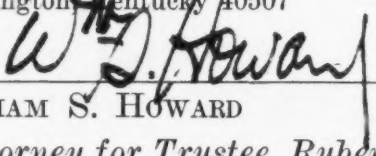
CONCLUSION

The Sixth Circuit Court of Appeals, having considered the Petitioners' request by panel, then on rehearing en banc, did not agree with the Petitioners' assertion that the Bankruptcy Court Judge need be compelled to rule in accordance with what the Petitioners saw as the mandate of the Court of Appeals. The desire of the Petitioners to bypass the ordinary avenues of appeal, simply because they believe the appeal will take too much time is not a special or important matter with which this Court should take its valuable and limited time. While declaring themselves "civil prisoners of the Court," the Petitioners are actually in no different position than any other litigant who wishes to appeal the conclusions of law of a trial court, but who does not wish to post a supersedeas bond to stay the effect of the decision. While the Petitioners claim a "national significance," the Petitioners' interpretation of the decision of the Sixth Circuit, which determined the legal effect of a document between the

parties, and which was affected by the old Bankruptcy Act is of significance only to the parties involved. As such, the refusal by the Sixth Circuit to grant the Petitioners' request of relief does not demonstrate unacceptable conduct requiring this Court's supervision and the Petitioners' Motion for Writ of Certiorari should be denied.

Respectfully submitted,

ODELL & HOWARD
171 North Upper Street
Lexington, Kentucky 40507

By: 

WILLIAM S. HOWARD
Attorney for Trustee, Ruben G. Hicks

APPENDIX

APPENDIX No. 1

APPLICATION TO EXTEND PERIOD WITHIN WHICH TRUSTEE SHALL ASSUME OR REJECT EXECUTORY CONTRACT—Filed November 3, 1972

To The Honorable Joe Lee, Referee In Bankruptcy:

The Application of Ruben G. Hicks, Trustee herein, respectfully represents:

1. Your Applicant is the Trustee of the above named estate, having been appointed October 6, 1972.

2. That the above named debtor has been adjudged a bankrupt.

3. That the above named bankrupt has by a writing dated the 22nd day of January, 1970, acquired an interest in real estate from Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, John Sloan, Margaret Sloan and Bruce R. Sloan. That the nature of the interest acquired by the above named bankrupt pursuant to the said agreement is the subject of a controversy presently before this Court. That your Trustee herein in the said controversy asserts and verily believes that the interest acquired in the aforesaid real estate is a fee simple title thereto.

4. That the bankrupt by a writing dated the 8th day of February, 1969, acquired an interest in other real estate from D. C. Byers, Flonnie Byers, David W. Byers, Sallie Ann Byers, Ruth Byers Graves, and Fred Graves. That this said real estate interest is the subject of a controversy now before this Court. That in the said controversy the trustee asserts and verily believes that the interest acquired in the said real estate was a fee simple title thereto.

5. That the Trustee believes that his claim to a fee simple title in the bankrupt in and to the aforesaid two tracts of real estate will be sustained by this Court. That,

however, if the said claim of the Trustee is not sustained, the aforementioned agreements could be interpreted as Executory Contracts between the said bankrupt and the above named persons.

6. That until the above controversy is determined by this Court, the Trustee will be unable to determine the necessity for acceptance or rejection of any such Executory Contracts, if any such contracts exist.

7. That it would be in the best interest of the creditors of the bankrupt estate to grant to the Trustee for the above reasons an extension of time to allow him to make such election as provided in Section 70B of the Acts of Congress relating to bankruptcy if the aforementioned written documents should be adjudged by this Court to be Executory Contracts.

WHEREFORE, your Applicant prays the Court for an Order extending the period within which he, as Trustee, shall assume or reject the Executory Contract relating to real estate herein, if any such writings are deemed to be such Executory Contracts, and that he be allowed such time after such finding of this Court to accept or reject any such contracts, and for such other relief as is just.

(s) William S. Howard
William S. Howard, Attorney
for Ruben G. Hicks, Trustee
171 North Upper Street
Lexington, Kentucky 40507
Telephone: 606/254-3302

APPENDIX No. 2

SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI
No. 85-600

QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the United States Court of Appeals for the Sixth Circuit, granting a Trustee in Bankruptcy an unlimited time to assume or reject an Executory Contract, (contrary to the expressed statutory limitations of sixty (60) days), conflicts with the decisions of this Court, decisions of all the Federal Courts, by ignoring, and thus extending or amending, the express limitations of 11 USC § 110b, Bankruptcy Rules 607 and 906, now codified as 11 USC 365(d)(1)?

II. Whether the Sixth Circuit decision, granting a fee simple interest in Kentucky land to the Trustee, under a terminable and defeasible Executory Contract, violates the requirements of 28 USC 1652 and conflicts with the decisions of this Court, other Federal Courts, and the law of Kentucky defining and governing a fee simple interest in land?

III. By awarding the Trustee a greater title than the Bankrupt had and by granting him such title without requiring the performance of its burdens and conditions, has the Sixth Circuit decision conflicted with and exceeded the permissible limits established by this Court and all other Federal Courts?

IV. Is the lower court decision a denial of the freedom of contract, by rewriting the contract contrary to its terms, and by denying the rights of termination, a deprivation of liberty and property rights in violation of the Fifth Amendment of the Constitution of the United States?

V. Whether the decision of the Sixth Circuit is so patently illogical, incompatible, and incomplete on its face that it departs so far from the usual and accepted course of judicial proceedings as to require the exercise of this Court's power of supervision?

APPENDIX No. 3

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON

Bankruptcy No. 72-650
Adversary Proceeding No. 14

IN RE:

BECKNELL & CRACE COAL CO., INC. - - - *Debtor*
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

LOLA GAY SLOAN, Et Al. - - - - *Defendants*

MOTION

Come the defendant John A. Sloan, Pro se, and pursuant to the provisions of 28 U.S.C. 144, moves the Court to recuse itself in this matter and to have this action assigned to another judge. In support of his motion, the defendant, John A. Sloan, relies on the attached Affidavit.

John A. Sloan, pro se

By: (s) John A. Sloan
R. #4, Albany, Ky. 42602
(606) 387-7344

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON

Bankruptcy No. 72-650
Adversary Proceeding No. 14

IN RE:

BECKNELL & CRACE COAL CO., INC. - - - *Debtor*
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

LOLA GAY SLOAN, Et Al. - - - - *Defendants*

AFFIDAVIT TO SUPPORT MOTION FOR COURT TO RECUSE ITSELF

Comes now John A. Sloan, and after first being duly sworn, states as follows:

1. I am a separate person in this action from the other defendants in that I have represented myself in this case since July, 1976. I was present at the hearing in Lexington, Kentucky, on May 19, 1986, and represented myself at said hearing.

2. In the week preceeding the trial, the attorney for the other Sloans, Mr. Douglas Sharp, and I took the depositions of the trustee, Mr. Rubin Hicks, for the purpose of discovery. To most of the questions of any importance, Mr. Hicks would not be responsive to Mr. Sharp's questions or was directed not to answer questions by Mr. Howard; usually in cases where Mr. Howard directed Mr. Hicks, the trustee, not to answer, it was after Mr. Howard had also objected to the question. Mr. Howard would not agree to a continuation of the depositions the next day in Lexington,

so that we could have the benefit of Judge Lee's ruling on the trustee's answering of these questions, but Mr. Howard would not agree to same, and the depositions were ended late in the afternoon at Whitley City, Kentucky, without our gaining much, if any, of the information we sought by taking the trustee's depositions.

3. On Monday, May 19, 1986, the attorney for the other Sloans at the trial, Mr. Douglas Sharp, before the beginning of the trial, moved the Court for sanctions against the plaintiff, and for a continuance based upon the failure of the depositions taken at Whitley City, Kentucky, where, as before stated herein, Mr. Hicks, the trustee, would not be responsive to the questions of Mr. Sharp, or would not answer at all; in the cases where Mr. Hicks refused to answer at all it was after objections from Mr. Howard, followed by instructions from Mr. Howard to Mr. Hicks, not to answer the question (questions). The Court summarily overruled both of these motions. It was evident to me that our inability to obtain this discovery, and the Court's refusal to compel discovery and to grant sanctions prejudiced the ability of the Sloans, including this movant, to get a fair trial.

4. I believe the Court evidenced bias in favor of the trustee and trustee's attorney, witnesses, the attorney for the trustee's proposed optionee, optionee's attorney, and for Dr. Becknell and his attorneys. Likewise I believe the Court displayed a prejudice against the Sloans, their legal cause, witnesses and attorney(s).

I base this in part, and as best I am able to describe in writing, on the following:

When we objected to the door of the witness room being and remained for long periods of time, open; the court would not exclude the witnesses from testifying because they said they did not hear the proceedings: although in past years since I've known Doyle Mills, witness for the

trustee, I have heard him boast of eavesdropping court proceedings at which he was a witness, and believe that since the door was open in this case, he heard at least part of the proceedings; although when questioned on this, he swore otherwise. Mr. Sharp and I were facing away from this door, therefore we had not noticed it until we objected, but it should have been obvious to the Court facing the door.

Mr. William S. Howard took the floor often and made pronouncements as to the nature of the trial, and the conduct of the proceedings, which were more properly the province of the Court, but with the obvious approval of the Court.

When it became clear upon the cross-examination of Mr. Orvill Smith that Greenwood Land and Mining Co., the party the trustee petitioned to option the property to, was not a proper legal entity, and that it, would not or could not be a proper party to the proposed option, the Court came to the rescue of the plaintiffs cause, and proposed that the Trustee amend his pleading in this regard, although trustee's petition proposing this impossible party as optionee had been filed with this Court since 1982. The Court simply told the plaintiffs to amend their pleadings from Greenwood Land & Mining Co., as proposed lessee, to Shamrock Coal Co., Inc., as proposed lessee.

The Court refused to allow the Trustee to answer the question as to whether he had assumed the executory contract with the Sloans, and the Court attempted to answer the question for the Trustee. Also the Trustee once told me, (however, this was several years ago), that he didn't know anything about the case, and indicated he didn't care anything about it, that he had agreed to be the trustee just to accommodate his old friend and lawschool classmate, Joe Lee. Further, that he did not decide anything for

himself in this case, but did as his attorney and the judge told him to do.

The Court clearly indicated its ruling in favor of the plaintiff, immediately upon the plaintiff's close; and did not even offer to hear anything in the way of evidence, or statements of counsel from our side until defendant's attorney, Sharp, vehemently protested, and made statements and comments on the plaintiff's case anyway; whereupon the Court stated that he was not aware that Mr. Sharp had a witness to present, and seemed to cut Mr. Sharp's remarks short by repeatedly telling him to call his witness, which he did. Mr. Sharp's chief witness was Mr. Tony Sloan, but he was called by Plaintiff as the last witness for the plaintiff; but was nevertheless used as the defendant's witness at the same time. At Mr. Sharp's protest of not being given a change at speaking or calling witnesses, the Court kept telling him to call his witness, that "this was his privilege."

Although I have not yet read the Transcript of Evidence of this proceeding, same left me with the firm conviction that the Court intends to do everything the plaintiff asks, unless he deems it not to be in plaintiff's best interest as seen from an advocate for the plaintiff's point of view.

Other things which I believe showed a bias against the defendants and a predetermined disposition to rule in favor of the plaintiffs were:

(1). Dismissal of our arguments that the trustee had nothing to option—as shown from analysis of the 6th Circuit's opinion.

(2). The Court's failure to recognize that the granting to anyone of this option would be both erroneous and the most oppressive use of judicial power; inasmuch as the option grants not only the optionee the power of trespass of all types to both the surface and the Coal, and includes opening seams of coal with heavy machinery, and the un-

limited use of air drills and core drills without limitation in numbers; without risk or damage to optionee (except the payment of a mere $10,000.00): and specifically to anyone knowledgeable in minerals and coal it is evident that such an option carries with it the risk of the destruction of the economic value of the mining property; if the optionee chooses to reject the option, as it has a perfect legal right to do. That there are no assurances to the true owner of the land or coal or both that the optionee would act in good faith but may use its "findings" for any number of reprehensible purposes; such as giving false reports to slander the quality and/or quantity of the coal whether dealing with the Sloans or the Trustee, or anyone else; in order to deter other interested parties and to *bargain* as said optionee sees fit.

That the parties hereto, both trustee and Sloans, are defenseless against such practices.

(3). That the Court is totally disregarding the last paragraph of the 6th Circuit's opinion.

The Court seemed to be of a mind set that his original opinion rendered in 1976, holding that the trustee held a full and perfected fee-simple absolute title to all the coal in place, subject only to "an inartfully expressed vender's lien" was totally upheld without qualification by the 6th Circuit; when in fact the language of the 6th Circuit's opinion reverses this holding.

The Court also seemed to ignore all of the last paragraph of the 6th Circuit's opinion. He heard, with apparent approval, testimony of plaintiff's witness, Mills, that the optionee would use the surface and the Coal as necessary for the purposes of the option. And that if the option were exercised, that the optionee would proceed with strip and underground mining of any or all of the coal as they chose, without regard to the language of said last paragraph in respect to Sloan's specifically reserved sur-

face rights and to their 300-foot blocks of coal at every 1500-foot interval. The judge stated from the bench (I believe) that "all coal mine leases required use of the surface." And the witness Mills stated that the reservation of the 300-foot blocks of coal by the Sloans were only applicable in case of Auger mining. That his company had never done any Auger Mining; and therefore seemed to say that these blocks would be explored under the option; and if the option is exercised, will be strip mined or underground mined. This was all stated with the apparent approval and agreement of Judge Lee—even though the proposed lease, appended to the option gives the optionee the right, if the option is exercised, to mine any and all of the coal by any legal means, which, of course, would include Auger mining.

Therefore, I again assert that the Court seems to be of a mind set to ignore many parts of the 6th Circuit's opinion which reverses his and the District Court's judgment and opinion—and that this is clearly shown by his attitude that the trustee already owns a full fee-simple absolute unconditional fee to all the coal, despite the wording of the 6th Circuit's opinion indicating otherwise.

And, finally, I think this is most clearly demonstrated by his disregard of the last paragraph of said court's opinion. Such disregard so clearly brings this into focus that I think it worthwhile to quote:

"We, therefore, AFFIRM, in part, REVERSE, in part, and REMAND. We also deny appellee's previously-refused motion for bond increase. We note that our decision does not alter the provisions of the contract. As a result, Becknell must leave in place 300-foot blocks of coal at 1500-foot intervals. These blocks of coal as well as the surface rights were specifically reserved by the appellants."

I believe it necessary to make this motion and affidavit as attorney for myself to protect my constitutional rights

of due process; and under the requirements of 28 U.S.C. 144, I certify that this affidavit and motion are made in good faith and are not filed herein for delay.

I believe that I have filed this before the Court has made its final written ruling herein; but the delay in filing has been caused by personal incapacity and sickness, as well as an only partly successful effort to read the written transcripts.

(s) John A. Sloan
John A. Sloan, Pro Se

Subscribed and sworn to before me by John A. Sloan, this 3rd day of June, 1986.

(s) ? ? ?
Notary Public

My commission expires: March 18, 1987

APPENDIX No. 4

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON

Bankruptcy No. 72-650
Adversary Proceeding No. 14

IN RE:

BECKNELL & CRACE COAL CO., INC. - - - *Debtor*
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

LOLA GAY SLOAN, Et Al. - - - - *Defendants*

MOTION

Come the defendants, Sloan, by counsel, and pursuant to the provisions of 28 U.S.C. 144, move the Court to recuse itself in this matter and to have this action assigned to another judge. In support of their motion, the defendants rely on the attached Affidavit.

Morgan and Pottinger

By: Douglas Gene Sharp
Counsel for Defendants
601 West Main Street
Louisville, Ky. 40202
(502) 589-2780

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON

Bankruptcy No. 72-650
Adversary Proceeding No. 14

IN RE:

BECKNELL & CRACE COAL CO., INC. - - - *Debtor*
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

LOLA GAY SLOAN, Et Al. - - - - *Defendants*

AFFIDAVIT

Comes Douglas Gene Sharp, and after being first duly sworn, states as follows:

1. I was trial counsel for all defendants, except John A. Sloan, who was present and represented himself, in the trial of the above referenced matter on May 19, 1986.

2. Prior to the beginning of the trial, I moved the Court for sanctions against the plaintiff and for a continuance based on the refusal of the plaintiff to answer questions with regard to indebtedness to the defendants. The Court summarily overruled those motions. It became evident during the course of the trial that the subject of those questions were relevant. Moreover, I believe the defendants were prejudiced by the Court overruling that motion, and that they were denied a substantive right of discovery thereby prejudicing the ability of my clients to obtain full discovery and hence a fair trial.

3. Based upon the actions of the Court during the course of the trial, I believe that the Court evidenced prejudice and predisposition to rule in favor of the plaintiff Trustee as demonstrated by the following:

a. When it became clear that the Trustee intended to contract with a party incapable of performing under the proposed option, it was the Court who suggested that the Trustee amend his pleadings (see Transcript of Evidence, Vol. 1, pp. 105 and 106):

b. The Court refused to compel the Trustee to answer the question as to whether he had assumed the executory contract with the Sloans and the Court attempted to answer the question for the Trustee (Transcript of Evidence, Vol. 1, pp. 41-44);

c. The Court clearly indicated its ruling (see Transcript of Evidence, Vol. 1, pp. 17-71), at the close of plaintiff's proof and before counsel for the defendants could make an opening statement or present evidence;

d. When pointed out by counsel for the defendants that defendants had not presented their case, the Court permitted the witness to testify, stating that was a "privilege" (see Transcript of Evidence, Vol. 1, p. 186). The defendants had a right to put on evidence. It was not a privilege.

e. The Transcript of Evidence herein further indicates beyond doubt that the trial court intends to proceed without complying with the judgment of the United States for the Sixth Circuit by:

(1) Refusing to uphold the defendants' right to terminate the contract;

(2) Refusing to recognize the immediate right of termination mentioned in said judgment;

(3) Permitting trespass or use and disturbance of the surface land which said judgment reserves to these defendants.

4. I believe that any reasonable person under the totality of the circumstances and tone at the trial and facts as evidenced herein would believe that the Court had a prejudice toward the application and petition of the Trustee which neither the evidence put before it on behalf of the defendants, the lack of supportive evidence on behalf of the plaintiff, or the constitutional rights and safeguards of due process could dissuade.

5. By and with this Affidavit, I make my certificate required under 28 U.S.C. 144, that the statements and the motion are made in good faith and not interposed for delay.

Further affiant sayeth not.

(s) Douglas Gene Sharp
Douglas Gene Sharp
Counsel for Defendants
601 West Main Street
Louisville, Kentucky 40202
(502) 589-2780

Subscribed and sworn to before me by Douglas Gene Sharp this 2nd day of June, 1986.

My commission expires: 1-13-89

(s) Ellen Morgan
Notary Public, Kentucky State at Large

APPENDIX No. 5

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON

Case No. 72-650
Adversary No. 14

IN RE:

BECKNELL & CRACE COAL CO., INC. - - - *Debtor*
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

LOLA GAY SLOAN, et al. - - - - *Defendants*

The court having considered the motion of the defendants Sloan, by counsel, and the separate motion of John A. Sloan, pro se, for the court to recuse itself in this matter and have this action assigned to another judge, finds that said motions should be and hereby are overruled.

The motions are not timely because they were filed with the court several days after the court had conducted a hearing in this matter on May 19, 1986 on the request of the trustee to assume the lease-purchase agreement with the defendants Sloan, which is the subject of this action, and to enter into an option agreement involving assignment of the lease to Greenwood Land and Mining Company, an operating division of Shamrock Coal Company, Inc. At the conclusion of the trial, the court announced its findings of fact and conclusions of law from the bench, as will appear in the transcript of the trial. The motion for the court to recuse itself after the conclusion of the trial and before entry of a judgment is simply not timely. The

matters complained of by the movant are a matter of record in the transcript of the trial and, even if accepted as fully accurate, are insufficient to support a request for recusal. The matters complained of can be raised on appeal.

The movants read too much into the language of the Sixth Circuit to the effect "that our decision does not alter the provisions of the contract." This is nothing more than the restatement of the well recognized principle that if a trustee assumes an executory contract he must do so *cum onere*. 2 *Collier on Bankruptcy* ¶365.01[1] at 365-9 (15th ed. 1986). The option agreement which the trustee seeks to enter into requires the proposed assignee of the lease-purchase agreement to abide by all the terms of the agreement.

The motion of the defendants Sloan to compel discovery and for sanctions, filed with the court on the day of the trial, relates to depositions which the parties took on the eve of the trial. It does not appear from the record that the trustee is contesting the amount that may be owed to the Sloans under the lease-purchase agreement except with respect to what extent interest may be payable on the indebtedness, an issue which can be subsequently determined by the court if Shamrock Coal Company, Inc. exercises the option to take an assignment of the lease-purchase agreement.

Dated: July 3, 1986.

By the Court

(s) Joe Lee
Judge

Copies to:

Douglas Gene Sharp
William S. Howard
John A. Sloan

APPENDIX No. 6

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON

No. 72-650

IN RE:

BECKNELL & CRACE COAL CO., INC. - - - *Debtor*
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

TONY SLOAN,
LOLA BETTYE SLOAN,
NED T. SLOAN,
JIMMIE SLOAN,
MARGARET SLOAN,
BRUCE R. SLOAN, and
JOHN A. SLOAN - - - - - - *Defendants*

NOTICE OF APPEAL TO DISTRICT COURT

The Defendants appeal to the District Court from the Findings of Fact, Conclusions of Law, and Final Judgment, Final Order, or Final Decree of the Bankruptcy Court entered in this adversary proceeding on the 11th day of June, 1986, and from the Orders Granting Injunctions or Restraining Orders against these Defendants on June 16, 1986, and on June 19th or June 20, 1986.

The parties to the Judgment and Orders appealed from, and their respective addresses, are as follows:

Lola Bettye Sloan
Route 4
Albany, Kentucky 42602

Tony Sloan
Route 4
Albany, Kentucky 42602

Jimmie Sloan
Route 4
Albany, Kentucky 42602

Ned T. Sloan
Route 4
Albany, Kentucky 42602

Margaret Sloan
Route 4
Albany, Kentucky 42602

Bruce R. Sloan
Route 4
Albany, Kentucky 42602

Ruben G. Hicks
Trustee
P. O. Box 292
Whitley City, KY 42653

John A. Sloan
Route 4
Albany, Kentucky 42602

All of the above listed Defendants, except John A. Sloan are represented by Elmer E. Morgan, Morgan and Pottinger, 601 West Main Street, Louisville, Kentucky 40202, telephone number (502) 589-2780.

The Defendant John A. Sloan is represented by himself and his address, and telephone number, being Route 4, Albany, Kentucky 42602, telephone number (606) 387-7344.

The Plaintiff, Ruben G. Hicks, Trustee, is represented by William S. Howard, 171 North Upper Street, Lexington, Kentucky 40507, telephone number (606) 254-3302.

I certify that the above parties are the only parties to the Judgment and Orders appealed from herein.

Morgan and Pottinger

By: (s) Elmer E. Morgan
Elmer E. Morgan
Counsel for Appellants
601 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 589-2780